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P.

Cv-12-452062

Court File No.

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN:

IMPERIAL TOBACCO CANADA LIMITED

Plaintiff

- and -

ATTORNEY GENERAL OF CANADA

Defendant

SEAL

**STATEMENT OF CLAIM**

TO THE DEFENDANT:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The Claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the *Rules of Civil Procedure*, serve it on the Plaintiff's lawyer or, where the Plaintiff does not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a Notice of Intent to Defend in Form 18B prescribed by the *Rules of Civil Procedure*. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date

APR-25/12

Issued by

N. MOHAMMED-RAHAMAN

Local Registrar

Address of

court office: 393 University Avenue, 10th Floor  
Toronto ON M5G 1E6

TO:

Regional Director General  
Ontario Regional Office  
Department of Justice Canada  
The Exchange Tower  
130 King Street West, Suite 3400, Box 36  
Toronto, Ontario  
M5X 1K6

## CLAIM

1. The plaintiff, Imperial Tobacco Canada Limited (“ITCAN”), claims:
  - (a) a declaration that s. 13(1) of the *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)*, SOR/2011-177, enacted pursuant to the *Tobacco Act*, S.C. 1997, c. 13, unjustifiably infringes s. 2(b) of the *Canadian Charter of Rights of Freedoms* and is therefore of no force or effect;
  - (b) costs of this action and HST; and
  - (c) such further and other relief as this Honourable Court deems just.

## The Parties

2. ITCAN is incorporated pursuant to the laws of Canada and has its registered head office in Montréal, Québec.
3. ITCAN is Canada’s largest tobacco manufacturer and distributor. Through brands such as *du MAURIER*, *Player’s* and *Peter Jackson*, ITCAN offers quality tobacco products to Canadian adults who choose to smoke. ITCAN has over 600 employees working from its head office in Montréal and regional sales offices throughout Canada.
4. The defendant, Attorney General of Canada, has the capacity to be sued under the *Crown Liability and Proceedings Act*, R.S.C. 1985, c. C-50.

## **The New Tobacco Products Labelling Regulations**

5. On September 22, 2011, the Governor in Council, on the recommendation of the Minister of Health, registered the *Tobacco Products Labelling Regulations (Cigarettes and Little Cigars)*, SOR/2011-177 (“*TPLR*”), enacted pursuant to ss. 17 and 33 of the *Tobacco Act*, S.C. 1997, c. 13 (“*Tobacco Act*”). The *TPLR* replaced the labelling requirements for cigarettes and little cigars in the *Tobacco Products Information Regulations*, SOR/2000-272 (“*TPIR*”), in force since 2000.

6. While the *TPLR* came into force on the day of registration, a transitional provision, s. 32, provides that they will not apply to products sold or distributed by a manufacturer for 180 days after coming into force (*i.e.*, until March 21, 2012) or to products sold by a retailer for 270 days after coming into force (*i.e.*, until June 18, 2012).

7. The *TPLR* introduce new health warnings, health information messages, and toxic emission statements to be displayed on packages of cigarettes and little cigars in Canada. Key features of the *TPLR* include:

- (a) Mandatory health warnings (consisting of 16 graphic health warnings) that must occupy at least 75% (up from 50% under the *TPIR*) of the two principal display surfaces of all packages of cigarettes and little cigars sold in Canada;
- (b) A toll-free “quitline” number and cessation web portal (the “Quitline Information”) that must be visually integrated into the text portion of the mandatory health warnings;
- (c) Toxic emissions statements (consisting of four rotating statements) that must be displayed on the greater of 60% or 10 cm<sup>2</sup> of one of the package sides that does not contain a health warning, other than the top or bottom of the package; and
- (d) Health information messages (consisting of eight rotating messages focussing primarily on the benefits of quitting) that must be displayed on leaflets inserted in packages or, in the case of slide and shell packs, either on a leaflet or on the exterior surface of the slide and the upper slide-flap.

## **The Massive Enlargement of Mandatory Health Warnings on Tobacco Packages in Canada**

8. Over the past 20 years, the Government of Canada has massively increased the size of mandatory health warnings on cigarette and little cigar packages sold in Canada.

9. Health warnings first appeared on cigarette packages in Canada in or about 1972. They consisted of a single voluntary text warning attributed to the Minister of Health, displayed in English and French on one side of the packages.

10. **15%.** In 1989, the *Tobacco Products Control Act*, S.C. 1988, c. 20 (“*TPCA*”) came into force and prohibited (with certain exceptions) all advertising and promotion of tobacco products and the sale of tobacco products unless packages included prescribed, unattributed health warnings, and a list of toxic constituents. Regulations enacted pursuant to the *TPCA* required one of four rotating text-only messages in contrasting colours to occupy 15% of the bottom portion of the principal display surfaces of cigarette packages.

11. **33%.** In 1993, the *Tobacco Products Control Regulations*, SOR/93-389 (“*TPCR*”), enacted under the *TPCA*, required eight rotating health warnings to be displayed on approximately 33% of the top portion of the principal display surface of cigarette packages.

12. In 1995, in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, the Supreme Court of Canada found that provisions of the *TPCA* (including the mandatory unattributed health warnings) unjustifiably infringed tobacco manufacturers’ freedom of commercial expression protected under s. 2(b) of the *Charter*. ITCAN and several other tobacco manufacturers nevertheless continued to display voluntarily the health warnings on their cigarette packages with an attribution to Health Canada.

13. In 1997, in response to the Supreme Court of Canada’s decision, Parliament enacted the *Tobacco Act*, re-imposing certain restrictions on tobacco advertising and authorizing the Government of Canada to regulate cigarette packaging and content. The legislation permits information and brand-preference advertising, but forbids all other forms of advertising (s. 22). “Brand-preference advertising” is defined as “advertising that promotes a tobacco product by means of its brand characteristics” (s. 22(4)).

14. **50%.** In 2000, the Governor in Council registered the *TPIR* pursuant to the *Tobacco Act*. The *TPIR* required rotating, graphic health warnings to cover 50% of the principal display surfaces of cigarette packages sold in Canada. The *TPIR* also mandated one of sixteen health information messages (either by way of leaflet insert or, in the case of slide and shell packages, on the upper slide-flap and back of the slide), and toxic emissions information to be displayed on the side of packages.

15. In 2007, in *Canada (Attorney General) v. JTI-Macdonald Corp.*, [2007] 2 S.C.R. 610, the Supreme Court of Canada found that the increase in mandatory health warnings from 33% to 50% of the principal display surfaces of cigarette packages under the *TPIR* infringed the freedom of commercial expression of tobacco manufacturers under s. 2(b) of the *Charter*, but was justified under s. 1.

16. **At least 75%.** As noted, in September 2011, the *TPLR* increased the size of the mandatory health warnings again, to at least 75% of the principal display surface of the cigarette packages (the “75+% health warnings”).

17. **Now more than 75%.** By virtue of the *TPLR*, the Government of Canada has now appropriated more than 75% of the principal display surface of cigarette packages. In February 2011, amendments to the *Stamping and Marking of Tobacco Products Regulations*, SOR/2003-288, adopted pursuant to the *Excise Act, 2001*, S.C. 2002, c. 22, required tobacco products to be “stamped” to confirm payment of federal excise duty. These amendments require an excise stamp of 2.9 cm by 1.4 cm to be affixed to each cigarette package in a manner that does not obstruct the mandatory health warnings under the *TPLR*. The excise stamp thus appropriated even more space on cigarette packages, over and above the 75% now appropriated by the *TPLR*.

### **ITCAN Has A Fundamental Right To Communicate To Its Customers**

18. It is lawful in Canada to manufacture, distribute, and sell tobacco and tobacco-related products to adults. Presently, approximately 5 million Canadian adults chose to smoke.

19. Tobacco manufacturers such as ITCAN have a fundamental right, protected under s. 2(b) of the *Charter*, to communicate information to their customers about their lawful tobacco

products. ITCAN's customers similarly have a fundamental right, also protected under s. 2(b), to receive information about those products.

20. In exercising its constitutional right to communicate about its lawful tobacco products, ITCAN uses its trade-marks, brands, and packaging to communicate to its customers and differentiate its products in the marketplace. ITCAN's trade-marks, brands, and packaging communicate origin, build goodwill and loyalty, and communicate brand information to consumers, allowing them to differentiate and select products based on quality and reputation. The value of ITCAN's brands is directly related to its customers' ability to identify and recognize those brands.

21. In the current regulatory environment in Canada, trade-marks, brands, and packaging serve a particularly critical communicative function because most if not all other means of communication are now severely restricted or prohibited. In recent years, federal and provincial legislation has severely restricted the ability of tobacco manufacturers to communicate to consumers. These measures have included total bans or restrictions on tobacco advertising, sponsorship, and promotion, retail display bans at the point of sale, and packaging rules and regulations, amongst others. As a result of these restrictions, the last meaningful way for tobacco manufacturers to communicate information to their customers, and to compete with each other at the point of sale, is through trade-marks, brands, and packaging.

**The 75+% Health Warnings Infringe ITCAN's Right to Commercial Expression Protected By s. 2(b) of the *Charter***

22. The compulsory 75+% health warnings under the *TLPR* infringe both ITCAN's right to communicate information and ITCAN's customers' rights to receive that information.

23. The 75+% health warnings infringe s. 2(b) of the *Charter* in at least two ways.

24. First, the requirement that tobacco manufacturers place the government's warning on at least 75% of the surface of their packages interferes with how manufacturers choose to express themselves. The 75+% health warnings compel manufacturers to carry the government's message in a manner and form directed by government.

25. Second, the requirement to carry the government's message on at least 75% of the surface of their packages restricts tobacco manufacturers' ability to convey their trade-mark and brand information to their customers and to protect the value of their trade-marks and brands. This effectively eliminates meaningful commercial communication between manufacturers and consumers about product characteristics, attributes, and value.

**The 75+% Health Warnings Cannot Be Justified Under s. 1 of the *Charter***

26. The government bears the burden of justifying under s. 1 of the *Charter* the infringement of tobacco manufacturers' and consumers' rights to freedom of commercial expression.

27. Even if the 75+% health warnings have a pressing and substantial objective (which is not at all apparent in the circumstances of this case), the impact on *Charter* rights is disproportionate and is therefore not justified under s. 1.

28. **No rational connection.** There is no demonstrable rational connection between reducing the incidence of tobacco use and/or increasing public awareness of the health effects of smoking and increasing the size of the mandatory health warnings on cigarette packaging from 50% to at least 75% of the principal display surface of the package.

29. Canadians are very well-educated and well-informed about the health effects of tobacco use. There is no credible evidence that increasing the size of health warnings from 50% to at least 75% of the principal display surface of the package would better inform Canadians or reduce smoking in Canada. Indeed, the previous increase in the size of the mandatory health warnings (from 33% to 50%) did not lead to any measurable change in public awareness or the smoking behaviour of Canadians.

30. **No minimal impairment of *Charter* rights.** The 75+% health warnings also do not impair tobacco manufacturers' and consumers' s. 2(b) *Charter* rights as little as reasonably possible. Instead, further increasing the size of the health warnings appropriates much of what little package space manufacturers have left to communicate to consumers about their brands. Amidst the vast range of policy options available to it, the Government of Canada had less drastic and less rights-infringing means to further its objectives.

31. *No proportionality of effects.* Lastly, increasing in the size of health warnings from 50% to 75+% of the principal display surface of the package will cause more demonstrable harm than any speculative good. The negative impacts of this measure on the freedom of commercial expression are simply too high a price to pay for any supposedly salutary effects of this law. The negative effects of this law include (but are not limited to) the following:

- (a) As noted, over the past twenty years, the Government of Canada has progressively curtailed tobacco manufacturers' rights to communicate to consumers and consumers' rights to receive information from manufacturers, thereby negatively impacting the manufacturers' trade-marks and brands. The 75+% health warning will further severely harm manufacturers' ability to freely communicate commercial information to their customers in the very small space left available to them.
- (b) Consumers rely on product packaging, trade-marks, and branding in choosing one tobacco product over another. By diminishing product differentiation among brands ("commoditization"), the 75+% health warning will give consumers less reason to purchase lawful, branded tobacco products and will incent them to switch to unbranded, illicit tobacco products, to the detriment of Canadian society as a whole. Illicit tobacco products consist primarily of unpackaged, unbranded cigarettes manufactured by criminal gangs without quality control or regulation. Illicit tobacco products are widely distributed in Canada at a fraction of the price of legal tobacco products, without collection or payment of taxes, health warnings, health messages, or toxic emission statements. They are sold indiscriminately to minors who are otherwise unable lawfully to purchase tobacco products in Canada. Since 2006, illicit cigarettes have made up between 18% and 33% of the Canadian market, and make up close to 50% of all cigarettes sold in Ontario. The 75+% health warnings will make illicit tobacco products more attractive and thereby detract from the federal government's health policy objectives.

32. Over the past twenty years, the Government of Canada has dramatically curtailed the constitutional rights of tobacco manufacturers to communicate with their customers about their lawful tobacco products. This, in turn, has dramatically curtailed consumers' constitutional rights to receive information concerning their purchasing decisions. Against this background, the 75+% health warning significantly encroaches upon the last available space left for meaningful communication between tobacco manufacturers and consumers. It thereby unjustifiably infringes s. 2(b) of the *Charter*.

33. ITCAN proposes that this action be tried at Toronto, Ontario.

April 25<sup>th</sup>, 2012

**OSLER, HOSKIN & HARCOURT LLP**

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IMPERIAL TOBACCO CANADA LIMITED

and

ATTORNEY GENERAL OF CANADA

Court File No:

Plaintiff

Defendant

*Ontario*

SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

STATEMENT OF CLAIM

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